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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1331

BRUNO ALBERT FREDERICK HEINE,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

GEORGE BOOCHEVER,
ROBERT L. BOBRICK,
Counsel for Petitioner.

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No. .....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE, AND ASSOCIATE JUSTICES, OF THE UNITED STATES SUPREME COURT:

Your petitioner respectfully shows:

A

Summary Statement of the Matter Involved.

By an indictment, consisting of one count, returned and filed in the United States District Court for the Eastern District of New York on the 5th day of September, 1944, petitioner, an alien of German nationality, was accused that on or about the 10th day of February, 1942, in his

application for a certificate of identification, he "knowingly did falsely and fraudulently state and represent that he had not been a member of or affiliated with, during the then past five years, any club, organization and society, whereas in truth and in fact within said five years he had been a member of and affiliated with the Nationalsozialistiche Deutsche Arbeiter Partei (commonly known as the Nazi Party); all of which was contrary to the form of the statute in such case made and provided, to wit: Section 80, Title 18, U. S. C.,* and against the peace and dignity of the United States" (fols. 14-19).†

Petitioner, after trial, was found guilty and sentenced for a term of eighteen months (fols. 446, 504-507). He appealed his conviction (fols. 508-513) which conviction has been affirmed by the United States Circuit Court of Appeals for the Second Circuit (pp. 198-199).

The Circuit Court of Appeals has stayed its mandate pending the decision by this Court on this petition.

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* SEC. 80 (Criminal Code, Sec. 35(A)). Presenting false claims. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

† All references are to the printed record and by folio, except in a very few instances and then the reference is to page.

A Summary of the Facts

Petitioner, a man forty-eight years of age, is an alien of German nationality. He came on December 14, 1937, with his wife and child, to live permanently in this country (fols. 476, 478, 479).

In 1914, at the age of eighteen years, petitioner went to work for the North German Lloyd Steamship Company and worked there until he was drafted into the German Army in 1916. After the war, in 1918, he returned to work for the same steamship company as a clerk and remained continuously in their employ until September, 1939. He held the position of financial manager of the advertising department until 1928, when he was assigned to conduct tours for the company and did so until his arrival in the United States in 1937 (fols. 31-35).

While conducting a tour in 1928 he met his wife, a native-born American citizen, for the first time. In 1931 petitioner came to this country and was married in Brooklyn. Husband and wife returned to Germany to live (fols. 34, 35).

In 1937 petitioner and his wife decided that they would prefer to make their permanent home in the United States and to bring up their boy here (fols. 253, 254, 400). Early in 1938 petitioner was re-employed in New York City by the North German Lloyd as a purchasing agent for office supplies, a position which he held until September 30, 1939, when he was discharged (fols. 36-37). As an enemy alien he found the difficulties of getting a new job insurmountable. Having lost the only job he ever had, the petitioner found himself in a desperate position. Exhibits 28, 29-A, 30-A, 36 (fols. 448-474) furnish in bold relief a graphic picture of petitioner's plight and his distraught state of mind. In his desperation he made use of a ruse, namely, an appeal to certain influential individuals that he was a "Party member" (fol. 464). As a result he did get

a minor clerk's job in Fortra, an organization started by three directors of the North German Lloyd for the purpose of sending food packages abroad. In 1941 Fortra was closed and the petitioner found himself out of work again. The petitioner was unemployed for about a year and a half and he was so unemployed when he was interviewed on January 8, 1943, by Special Agent of the F. B. I., Ernest Robert Riddle, Jr. (fol. 38).

The Government, through the witness Buchler, a confessed Nazi held as an internee at Ellis Island, attempted to prove that petitioner was a member of the Nazi Party by having Buchler testify that on a rare occasion when Buchler spoke to petitioner the petitioner had said to him, "I was with the party in Germany," but could not remember the petitioner using the word "member" (fol. 228). This conversation the petitioner denies and denies that he ever spoke to Buchler regarding politics or the Nazi Party, or that he ever told him that he was a member of the Nazi Party (fols. 212, 219, 221, 224, 227, 228).

The Government seized from petitioner's home all the books and magazines containing pictures of Hitler and swastikas and introduced them in evidence. These papers amount to a very small part of petitioner's total library which contained about 1,200 books (fol. 265). Most of the seized material had been sent to the petitioner as a result of his position with a German steamship company (fols. 55, 59).

The Government witness Illian was a stenographer in the German consul's office from March, 1939 to May, 1941. She testified she collected the dues from party members and kept the record of payments (fols. 83, 84, 85). She outlined in great detail how the records were kept. She said Exhibit 24, consisting of seven sheets, typewritten on both sides, was composed by a co-employee and herself and that she composed the last two sheets (fols. 125, 128, 161). She identified the said exhibit as a Nazi Party

membership list. On the back of page 1, after the number 122, is found the name of Bruno Heine. This name was not identified to be that of the petitioner, nor was it connected or associated with the petitioner. It should be observed that although this witness for over two years was at the consul's office collecting membership dues, keeping records, etc., she did not testify that she ever saw the petitioner or that she ever collected any dues from him. This witness further testified that Exhibit 25 was a list of those who were in arrears in their dues (fol. 134). The name "Heine, Brun" appears on this exhibit, but it was never connected or associated with or identified to be the petitioner.

Petitioner denies that he was ever a member of the Nazi Party (fols. 38, 257, 272). The record does give the organizations of which he had been a member. He had been a member of a hiking club, which he had joined when he was twelve or thirteen years old, but had dropped out in 1935 when he saw the Nazis dominating the club (fols. 34, 43). Petitioner had been a member of an advertising club in connection with his work at the steamship company (fol. 41) and it was this membership which brought him magazines and literature with pictures of Hitler and swastikas, some of which he had kept, and these were taken from his house (fols. 55, 59). Petitioner did not join any of the German-American organizations in this country and was not a member of any society or organization (fol. 272).

Petitioner's wife testified (fols. 400, 401) that her husband was not a member of the Nazi Party, either in Germany or in the United States, or affiliated with it in any way.

Responsible citizens came to court and testified, or were ready to testify, to the good reputation of the petitioner for truthfulness. These citizens were Dr. William F. Sunday, pastor of the Church of Good Shepherd in Bay

Ridge, Brooklyn, Dr. Walter M. Howlett of the Division of Christian Education of the Protestant Council, and Mr. John L. Schellenberg, a civil engineer employed for thirty-eight years by the City of New York, and Mrs. Siri Kloving, a member of petitioner's church. The latter two witnesses gave positive testimony as to petitioner's good reputation for truth and veracity (fols. 375-395).

The Exhibits

All the exhibits in the case are respondent's. Exhibits 28, 29-A, 30-A, 36, 37, 38 are set out in full in the record (fols. 448-498). The balance of the exhibits are briefly described in a stipulation at folios 552 through 575 of the printed record.

B

Basis of the Court's Jurisdiction.

This Court may by certiorari have this case certified to it for determination under the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 936, Title 28, United States Code, Sec. 347, amending and re-enacting Sec. 240 (a) of the Judicial Code (Appendix to Rules, 306 U. S. 727, 731). Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716, and Rules for Criminal Appeals, promulgated May 7, 1934, Rule XI (292 U. S. 661, 665-666).

The opinion in the Circuit Court of Appeals (pp. 194-198) was rendered April 27, 1945. The judgment and order for mandate was entered May 14, 1945 (pp. 198-199).

C

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals has decided important questions of general criminal law in a way probably untenable, in conflict with the weight of authority and against reason.

(a) It has decided that instructions, *in totidem verbis*, based on a statute long repealed, having no applicability to the charge made against petitioner, and charging a different crime than that set out in the indictment, were favorable to petitioner and "clearly harmless".

If this decision is permitted to stand it establishes a precedent for basing a conviction upon a repealed statute.

(b) It held that the introduction in evidence of certain magazines, books and pins, none of which were contraband (Exs. 1-8, fols. 553-556), is proper to prove "knowledge or wilfulness" to falsify. It is elementary law that a jury may not presume a guilty intent merely from the possession of lawful material.

(c) It held that a mass of irrelevant evidence of a highly prejudicial nature, to wit, Exhibits 10, 10-A through 23, 23-A, 26, 26-A, 27, 27-A (outlined in fols. 557-567, 570-572), was properly admitted in evidence although there was no connection or relationship between the evidence and petitioner. All that this evidence could conceivably tend to prove was the existence of an organization, which was not an issue in the case.

(d) Although the respondent conceded in its brief filed in the Court of Appeals that Exhibits 2, 2-A (outlined in fols. 553-554), 31, 31-A through 35, 35-A (outlined in fols. 573-575) were of no significance, the Circuit Court of Appeals ignored their prejudicial effect to the defense.

It further held that these exhibits were property unlawfully held, when none of them was legally forbidden to petitioner to possess.

(e) It held that petitioner's name appeared on Exhibits 24 and 25 (fols. 569-570), which played an important part in the case. This holding was an assumption without a basis in the record, for there was not even a suggestion of proof that connected the name on the said exhibits to the petitioner. Mere identity of name is not sufficient in a criminal prosecution to show identity of person.

2. The decision of the Circuit Court of Appeals is made in violation of the Constitution of the United States.

The Grand Jury indicted petitioner for one crime, i.e., for making a false statement to a department or agency of the United States. The Trial Court by its instructions to the jury, in effect and for all practical purposes, amended the indictment so as to include another crime, one for which the Grand Jury had issued no indictment, namely, that petitioner was also charged with cheating and swindling or defrauding the Government of the United States or a department thereof of money or property.

The verdict is general and no special finding has been made; it is possible and probable that the conviction of the petitioner rests wholly or in part on the belief of the jury that petitioner was guilty of defrauding the Government, a crime of which he had not been accused before the Grand Jury, for which he was not indicted and as to which no evidence had been offered.

The Fifth Amendment guarantees that one accused of an infamous crime may not be prosecuted except on a true bill returned by a grand jury.

A trial and conviction based upon the charging part of the indictment and upon language first introduced by the Court constitutes a violation of the Constitution and is fundamental error. The petitioner was thereby deprived of

his liberty without due process of law. This Court has so held in *Cramer* v. *United States*, decided April 23, 1945, 13 L. W. 4347, S. Ct. , see note 45.

3. The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849, where it was held that a change or an amendment in any manner of the substance to an indictment without resubmission of the case to the grand jury ousts the Court of jurisdiction.

4. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *Filippon* v. *Albion Slate Co.*, 250 U. S. 76, 82, and *U. S.* v. *River Rouge Co.*, 269 U. S. 411, 421, where this Court has held that an erroneous statement of the law in the instructions to the jury is presumptively prejudicial in criminal cases as well as civil cases.

The Circuit Court of Appeals admits that the Trial Court charged the jury from a statute no longer in effect but failed to hold that this erroneous statement of the law was presumptively prejudicial.

5. The petitioner was deprived of a fair trial when the Circuit Court of Appeals failed to give consideration to other prejudicial errors in the charge such as virtually haranguing the jury for a conviction (fols. 441, 442, 443), misstating facts to the jury (fol. 437) and suggesting to the jury what they should conclude from the evidence (fols. 431, 432).

6. The Circuit Court of Appeals has construed regulations having the effect of law in a way contrary to their plain intent.

(a) It has erroneously construed the regulations adopted by the Attorney General on January 22, 1942 (1942, Feb. 5, Fed. Reg. VII, 844), under Presidential Proclamation No. 2537, January 14, 1942 (1942, Jan. 17, Fed. Reg. VII, 329),

as requiring the disclosure of membership in a political party or national organization, here or abroad, during any portion of the then five years preceding the date of registration. By the last clause of Section 6(n)(14) of the Regulations, petitioner was not required to make any statement with respect to membership in any political party, except during such period he spent outside the United States in the five-year period prior to registration date, which required fact respondent failed to prove.

(b) It has erroneously construed the official application form (Ex. 38, fols. 487-497) as requiring information not called for by the questionnaire provided for this purpose. It is upon this erroneous construction that the conviction rests. The questionnaire (item 14) does not require any statement of political party membership by petitioner. Therefore, petitioner was indicted and convicted of a charge which did not constitute a crime.

D

Prayer.

Wherefore, your petitioner has filed the record of the Circuit Court of Appeals in this case and has complied with the rules of this Court in all other respects, and submits that this case merits review by certiorari, and prays that this petition for a writ of certiorari be accordingly granted.

May 28, 1945.

Bruno Albert Frederick Heine,
by George Boochever,
Robert L. Bobrick,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

I

The Opinions of the Courts Below.

No opinion was rendered by the District Court.

The opinion of the Circuit Court of Appeals for the Second Circuit (Charles E. Clark, C. J.) is to be found at pages 194-198 of the Record, and it has not been officially reported.

II

Statement of the Case.

A statement of the facts has been given in the accompanying petition under the heading "Summary Statement of the Matter Involved",* and in the interest of brevity that statement is not repeated at this point.

III

Specifications of Errors.

The ways that the Circuit Court fell into error are noted in the petition under the heading "Reasons Relied On for the Allowance of the Writ", and in the further interest of brevity they are not here repeated in another form.†

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* Pages 3-6, supra.

† Pages 7-10, supra.

IV

Argument.

Summary of Argument

Point A. To instruct the jury from a repealed law which charges the petitioner with a crime not within the framework of the pleadings, nor encompassed by the indictment or evidence, did not, as the Court held, influence the jury in favor of petitioner, nor was it harmless, but is prejudicial error that tended to lead to petitioner's conviction.

Point B. The Court's erroneous charge from an inapplicable and repealed statute was in effect an amendment of the indictment in violation of the Fifth Amendment to the United States Constitution.

Point C. 1. The Circuit Court erred in holding that mere possession of lawful material could be introduced to show the background from which petitioner's knowledge and willfulness might better be judged.

2. The Circuit Court erred in holding that prejudicial matter was properly introduced to prove an issue which did not exist in the case.

3. The Circuit Court erred in disregarding the prejudicial effect of certain exhibits which were conceded by respondent to have been of no significance in the case. It erred in holding that these exhibits were lawfully seized.

Point D. The Circuit Court erred in upholding the conviction although it was based upon an identification resting wholly upon concurrence of names, which, under general criminal law, is wholly inadequate for purposes of identification.

POINT A

Charging the jury from a statute no longer in effect to the prejudice of petitioner is reversible error.

The Court charged (fols. 414, 415):

> "Members of the Jury, the law under which this defendant has been indicted has to do with concealment from the United States of material information, for a fraudulent purpose. I will read you part of the statute so that it will be clear in your minds, and I am reading from Title 18 of the United States Code, Section 80, as follows:
>
> 'Whoever, for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States or any department thereof, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations * * *' shall be guilty of the crime described in the statute.
>
> That is the nature of this case."

This language is taken from Section 35 of the Criminal Code (Sec. 80 of Title 18, United States Code), c. 194, 40 Stat. 1015, 1016, prior to amendments of June 18, 1934; c. 587, 48 Stat. 996, and April 4, 1938, c. 69, 52 Stat. 197.

Under the statute prior to the amendments this Court held that Section 35, which used the word "defrauding" in connection with "cheating and swindling" should be be construed "as relating to the fraudulent causing of pecuniary or property loss" to the Government.

The words "cheating and swindling" are words of limitation which made the provision applicable *only* to cases where pecuniary or property loss to the Government had been caused.

See: *U. S.* v. *Gilliland*, 312 U. S. 86, 92, 61 S. Ct. 518 (1941), citing *U. S.* v. *Cohn*, 270 U. S. 339, 346, 347; 78th

Cong. Rec. (73d Cong., 2d Session), Part 10, pp. 11270, 11271; Part 11, p. 11513.

The Court's charge contains limiting language nowhere to be found in Section 35 of the Criminal Code after the Act of June 18, 1934, 48 Stat. 996, and, therefore, the charge was an incorrect statement of the law, and the charge did not state the nature of the case.

Thus the petitioner stands convicted under a penal statute which is no longer in effect. The statute as it has been construed by this Court, applies only to cases where pecuniary or property loss results to the Government and it is apparent that the crime with which the petitioner is charged in the indictment does not involve pecuniary or property loss to the Government due to willful concealment by some trick, etc., of a material fact.

A conviction under a statute no longer in effect, and for a crime not charged in the indictment, is a dangerous precedent.

The charge was not responsive to the matter under consideration, for it was inapplicable to the evidence. The jury was instructed to matters upon which they were not required to pass, for the charge presented to them issues not involved.

The petitioner was entitled to have the jury correctly apprised of the charge against him and this was not done.

As the Court in *Williams* v. *U. S.*, 131 F. (2d) 21, 23, 76 U. S. App. D. C. 299, observed:

> "It is * * * important to a defendant to have a jury instructed on the law applicable to his particular case by the judge * * *. But, of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of responsible citizens, is entitled to this legal instruction if it must accept the duty of passing upon the very life and death of a man. The law requires it."

It is evident that the error here urged is so serious and substantial as to produce a miscarriage of justice, and this is so though no objection and exception was taken to the erroneous charge.

This Court has held that where serious injury may result, it is the duty of an appellate court to notice and correct errors—especially when embodied in the charge to the jury—even though they were not challenged during the trial (*U. S.* v. *Atkinson*, 297 U. S. 157, 160; *Brasfield* v. *U. S.*, 272 U. S. 448, 450; *U. S.* v. *River Rouge Co.*, 269 U. S. 411). This is particularly so when the case comes up from a lower federal court (see *Clyatt* v. *U. S.*, 197 U. S. 207, 221-222; *Wiborg* v. *U. S.*, 163 U. S. 632, 658-660).

An erroneous statement of the law in instructions to the jury is presumptively prejudicial, in criminal cases as well as civil cases (*Filippon* v. *Albion Slate Co.*, 250 U. S. 76, 82; *U. S.* v. *River Rouge Co.*, 269 U. S. 411, 421).

The use of the words to the jury of "cheating", "swindling" and "defrauding" must have conveyed to them a more ominous charge, that is to say, that the petitioner's actions also included the cheating and swindling and defrauding of the Government. Who can say what effect these additional criminal charges had on the jury? How then is it possible for the Circuit Court to say that the erroneous charge was favorable to petitioner or clearly harmless?

Dombroski v. *State*, 192 Ark. 263, 90 S. W. (2d) 973, shows what a court must do when confronted with the issue of an instruction in a criminal case based on a former statute which has been materially changed.

The Circuit Court cites *Douchan* v. *United States*, 6 Cir., 136 F. (2d) 144, cert. d. 319 U. S. 773. In this case the language of the amended statute did not differ substantially (i.e., in meaning) from that of the former statute, and the acts charged against the defendant were indictable under either statute, whereas in the case presented for review, first, the language of the repealed statute differed ma-

terially and substantially from the statute in effect at time the act charged against petitioner was performed; second, the act charged against petitioner was not indictable even under the former and incorrect statute read to the jury in the Court's instruction.

The other two cases cited by the Circuit Court, namely, *United States* v. *J. Greenbaum & Sons*, 2 Cir., 123 F. (2d) 770; *Burns* v. *United States*, 274 U. S. 328, 331, 332, have no application and shed no light upon the problem.

It seems almost self-evident that the error complained of is grievous enough to necessitate a reversal of the conviction herein. Both on the basis of natural reason and juridical reasoning, it seems just plainly wrong to uphold a conviction on an instruction taken from a non-existent statute quoting language, the meaning of which is foreign to the evidence. In sustaining such a conviction the Circuit Court of Appeals failed to require in the trial of a criminal case the dignity, humanity and impartiality characteristic of American Courts.

It seems that the Circuit Court's holding makes for a looseness and inaccuracy in criminal prosecutions that would weaken the safeguards the law affords an accused, guilty and innocent alike. Judicial sanction to such a proposition would not be confined to the case at bar, as "the tendency of a principle to expand itself to the limit of its logic" (Cardozo, J., Nature of the Judicial Process, p. 51) is generally acknowledged.

POINT B

The erroneous instruction in effect amended the indictment so as to include another crime in violation of the Fifth Amendment to the United States Constitution.

In effect, the Court's charge amended the indictment by adding another crime, to wit, that petitioner was accused also of cheating and swindling or defrauding the Government of the United States or a department thereof of money or property. There is no such charge in the indictment found by the Grand Jury nor is there any claim or proof anywhere here of pecuniary or property loss.

Such an amendment amounts to a reindictment without a Grand Jury which is prohibited by the Fifth Amendment of the United States Constitution.

In *United States* v. *Faucett*, 3rd Cir., 115 F. (2d) 764 (1940), the Court stated (p. 766):

> "At common law it was beyond question that in the English Courts the body of an indictment could not be amended. The reasoning behind this rule was that the finding of a grand jury was upon oath and, depending upon this fact amongst others for its validity, could not be amended by the court or presiding officer *in any manner* of substance, without the concurrence of the grand jury which presented it. *Rex* v. *Wilkes*, 4 Burrow 2527, Hawkins Pleas to the Crown, Bk. 2, C. 25, Sec. 97. This doctrine has been followed in the Federal courts and whenever an amendment of substance has been made in the body of an indictment, the courts have been quick to hold it violative of the Fifth Amendment of the Constitution providing that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury'. *Ex Parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849; *Dodge* v. *United States*, 2 Cir., 258 F. 300; *Stewart* v. *United States*, 9 Cir., 12 F. 2d 524.

> This is true even if the defendant agrees that the facts stipulated should have the same effect as if set forth in the indictment, *United States* v. *Norris*, 281 U. S. 619, 50 S. Ct. 424, 74 L. Ed. 1076." (Italics ours.)

Ex Parte Bain, supra, is the authoritative case in this country that an amendment in any manner of the substance of an indictment without a resubmission of the case to the Grand Jury ousts the court of jurisdiction, and a defendant would be entitled to his discharge by writ of habeas corpus.

At page 767 of the *Fawcett* case the Court further said:

> "The test as to whether the defendant is prejudiced by an amendment to an indictment has been said to be whether an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other"; citing *State* v. *Moyer*, 76 Or. 396, 149 P. 84.

Applying the tests to this cause, (a) it is too apparent for argument that the act charged against the petitioner in the indictment, to wit, willful concealment of a material fact not involving pecuniary or property loss to the Government was not a crime under the statute read to the jury as "the nature of the case", and, therefore, the charge against the petitioner was not indictable thereunder; (b) nor was the evidence of the respondent or petitioner applicable to an indictment charging that the petitioner fraudulently caused pecuniary or property loss to the Government.

It is impossible to determine under the general verdict that the jury did not convict under the repealed statute with no evidence in the record to support such conviction (*Cramer* v. *U. S.*, decided by this Court April 23, 1945, 13 L. W. 4347; ..... S. Ct. .....).

POINT C

I. Guilty intent may not be inferred from the mere possession of lawful material, and the Circuit Court fell into error in not so holding.

II. It is error to hold that a mass of prejudicial evidence was properly received on a matter not an issue in the case.

III. Reversible error is practically admitted by respondent when it conceded in the lower Court that Exhibits 2-2a and 31 through 35 were of no significance, yet the Circuit Court ignored the concession and their prejudicial effect by omitting any reference to it in the decision. It also erred when it held that the record does not support the claim that this evidence was taken from petitioner's home without consent or proper warrant.

As to I hereof

The following numbered exhibits were all marked for identification during the examination of the witness Riddle, at the folio of the record indicated, and were received in evidence at folio 248 of the record. Exhibits marked "A" are English translations of German originals. They are briefly described.

Exhibit	*Folio*	*Description*
1–1A	40	Magazine, Die Deutsche Werbung. The p lication for Economic Advertising and Advertising World.
2–2A	46, 203	Passport and translation of page 8. " ported New York, N. Y. Sept. 6, 1939, Ger Consulate General."
3, 4	48	Pins and emblems.
5–5A	56–57	Book, Deutschland Zwischen Nacht Und (Germany Between Day and Night).
6	58	Booklet containing pictures of Hitler.
7	61	German-Japanese dictionary.
8	62	Trade guide issued by Deutscher Kons Verband, Inc. German-American Busi League.

The witness Riddle secured the foregoing exhibits, with the exception of Exhibits 2 and 2A, from a search of petitioner's home. The petitioner gave this witness his consent to search his home (fol. 29).

The exhibits were not relevant or material to the charge made against the petitioner, and the effect of these exhibits, singly and collectively, was prejudicial to the defense.

Piling up in evidence publications in German containing pictures of Hitler and swastikas, and a Japanese-German dictionary, along with pins and emblems of German origin, was dramatic and impressive and could only succeed in causing prejudice against the petitioner.

The possession of these exhibits did not tend to establish that the petitioner was a member of the Nazi Party, for such literature, insignia, etc., may be found in the possession of non-Germans, United States citizens, anti-Nazis, libraries, colleges and elsewhere. They were irrelevant, for they did not tend to prove the fact in issue, viz., membership. Nor were the exhibits material, for they did not tend to establish the controversial fact of membership or affiliation.

There is not, nor can there be, a presumption that from the possession of lawful material the jury may infer evidence of guilt. The exhibits had no practical value in determining the fact of membership or affiliation. No proof of their use was offered during the indictment period or at any time, except mere innocent possession.

It does not appear that the books and papers taken from petitioner's library were representative of that library. In fact, the contrary appears, for there is testimony that petitioner had a large library. The books and periodicals might be found in any representative library. In the absence of proof of illegal activity on the part of the petitioner, the possession by him of these books, etc., has no more significance than their possession by anyone else.

The Circuit Court held that there was no error in admitting these exhibits, as they went to establish the background from which the petitioner's knowledge and wilfulness might better be judged.

This holding appears to be untenable for the reason, in addition to those above given, that it can even be argued with persuasiveness that the fact that the petitioner had these things so casually and openly was probative of his honesty and lack of intent to conceal or deceive.

The real purpose in getting these exhibits (pins, books, magazines) to the jury was for them to see pictures of Hitler, swastikas, etc., the respondent knowing that such matter would tend to build up a personal hostility in their minds against the petitioner and seal his doom.

As to II hereof

Due objection and exception was taken by the petitioner to the admission of the following exhibits (fols. 246-247) which were marked for identification during the testimony of the witness Illian, at the folio of the record indicated, and although not formally in evidence, testimony was taken concerning them. They were received in evidence at folio

248. Exhibits marked "A" are English translations of German originals.

Exhibit	*Folio*	*Description*
10–10A	89	Blank application for admittance into N Party.
11–11A	89	Blank questionnaire used as part of appli tion.
12–12-A	89	Blank form. Part of application—that ap cant not a member of German-Ameri Bund.
13–13A	89	Blank form. Statement certifies applic does not belong to Rotary Club.
14–14A	89	Blank form questionnaire. Part of appli tion.
15–15A, 15–B	97	Ausland Ausweis and card, foreign ident cation folder, listing ten rules of condu Do not contain petitioner's name, but ha another's picture and card.
16–16A	104	Pink membership card. Does not conta petitioner's name. Card of one Carl Aign not connected with case in anywise.
17–17A	104	Green membership card. Does not conta petitioner's name. Card of one Augu Richert, not connected with case in anywi
18–18A	108	Red membership book of one Ernest Barn not in anywise connected with case. Do not contain petitioner's name.
19–19A through 23–23A	113	Dues receipts, some without names, som with names. Petitioner's name nowhere ap pears.
26–26A	143	Fifteen (15) letters or invitations to festiv ties sponsored by German Consulate.
27–27A	170	Instruction slip.

At folio 140 the following colloquy took place with respect to the exhibits:

> "Mr. Levinson: I hope your Honor is taking all this testimony subject to connection?
> The Court: Oh, yes, thus far the witness has been identifying or describing those exhibits marked for identification so that the record will be conformitive (sic)."

At folios 177-178 the following colloquy took place between the Court and trial counsel for petitioner:

> "Mr. Levinson: Your Honor, the defendant respectfully moves to strike out all the testimony of this witness on the ground that the Government has failed to connect this defendant in any manner whatever as charged in the indictment, with the commission of this crime as charged. There is no testimony here by this witness which connects this defendant, and therefore it is incompetent, irrelevant and immaterial.
> The Court: You may be right and perhaps your motion would be proper when the Government rests. I will not grant your motion at this time, but I reserve to you the right to renew it."

It was error not to grant the motion then or later for there is not a scintilla of evidence to connect the petitioner with these exhibits.

The inadmissibility of these exhibits was acknowledged in effect by the Court, when it charged (fol. 427):

> "Those papers I have referred to, Exhibits 10 to 23, * * * I think if I were you, I would not look at those papers. I do not think they will assist you in the performance of your task. You have the right, however, to look at them."

However, the exhibits were in evidence, and this charge could not eradicate their damaging effect. Furthermore, any tendency that the above-quoted charge might have to lessen such damage was eradicated by the following statement by the Court, when it charged at folio 427:

> "* * * You have the right, however, to look at them. You have the right, having examined Exhibits 24 and 25, to look at the material used in the compilation of Exhibits 24 and 25, if you accept the testimony of the witness, Illian, on that subject."

This charge could only confuse a jury to the petitioner's prejudice and the cumulative effect of the introduction of all these non-relevant exhibits prejudiced the petitioner seriously.

As the testimony of the witness Illian is read, the impression continues to grow that the exhibits, as they are identified by the witness and testimony given concerning them, to wit, the applications, questionnaires, membership cards, membership book, dues, receipts, letters and invitations, relate to the petitioner, that they contain the name of petitioner, his signature, etc. But they do not contain the petitioner's name, signature, etc. They have no relation to the petitioner and it is apparent that these non-material and irrelevant documents in the circumstances could only prejudice the defense unduly. All that the foregoing exhibits might tend to prove is the existence of an organization, namely, that of the Nazi Party, which was not an issue in the case. But the apparent motive for getting the exhibits in evidence was to place before the jury matter of a highly prejudicial nature, having no conceivable relation to the petitioner.

Yet the Circuit Court held that these exhibits were properly admitted, "In order to prove that defendant (petitioner) was a member of the Nazi Party in the United States, the prosecution clearly had to establish the background of its existence and mode of operation as a political organization in this country."

This holding by the Circuit Court is a rationalization of the motive for the introduction of this cumulative mass of exhibits.

The existence of a Nazi party organization in this country was not an issue in the case. At least, it was not a

contested issue. *Arguendo,* if it were necessary for the Government to prove that the Nazi party existed here, it was not at all necessary to do so by exhibits of this character. In fact there was no need for the introduction of a single one of these exhibits, for the existence of a Nazi party organization was fully established by the direct testimony of the witness Lilly Illian (fols. 84, 85, 86, 87, 88, 89, etc.).

The real motive in placing before the jury these exhibits (membership cards, application forms, instructions, etc.) was to anger the jury against the petitioner, because they contained highly prejudicial matter such as, that applicant does not belong to Rotary Club (Exhibit 13), or that applicant is free of Jewish or colored racial strains (Exhibit 10) or the rules of conduct of a Nazi party member (Exhibit 15) or statements over the signature of Adolf Hitler (Exhibit 18) or matter concluding with "Heil Hitler" (Exhibit 26), etc.

As to III hereof

These exhibits are:

hibit	*Folio*	*Description*
2	46	Passport book. Translation of page 8. "Reported, New York, N. Y. Sept. 6, 1939. German Consulate General."
A	203	
31A	197	Certificate of Ownership No. 086851. Certifies petitioner awarded German Field Medal of Honor for service at front during First World War.
32A	197	Papers issued by Military Registration Office, Bremen, that petitioner was found fit for limited service. Military service status is given as "Second Reserves".
33A	197	Booklet, England and the Boers.
34A	197	Booklet, England—Despotism in Ireland.
35A	197	Newspaper, Illustrierter Beobachter—Illustrated Observer, Special Edition, March 16, 17, 1935.

The Circuit Court states that the record does not support the claim that this evidence was taken from petitioner's home without consent or proper warrant.

The testimony on this score is (fol. 404):

> "Q. Did he ask you (petitioner's wife) for permission to search your home? A. He did.
>
> Q. And did you give him that permission? A. No.
>
> Q. Did he tell you that he had an executive search warrant and that in case you refused permission he would be required to search anyway? A. Yes.
>
> Q. Did you continue to refuse to permit him to search your home? A. Yes, I did, because I resented it."

The warrant was not produced or shown.

Without warrant, in petitioner's absence and without petitioner's consent, and over protest and objection of petitioner's wife these exhibits were seized.

A search made without warrant, and not as an incident to a lawful arrest, is unlawful (*Agnello* v. *U. S.*, 269 U. S. 20), and under the Fourth Amendment of the United States Constitution these papers should not have been received in evidence (*Goldstein* v. *U. S.*, 316 U. S. 114).

The Circuit Court said the use of the warrant (not produced) was justifiable to search for property unlawfully held by an alien enemy.

But, the possession of the exhibits by petitioner was not unlawful or forbidden. They were not illegal before this country entered the present war, and their possession was not declared illegal after we entered the war.

The exhibits discussed here were not stolen or forfeited property, smuggled goods, implements of crime and the like. There is a distinction *toto coelo* between contraband articles, on the one hand, and a man's private papers on the other, seized for the purpose of obtaining information therein contained, or of using them as evidence against him. In the former case, the Government is entitled to possession of the property, in the latter it is not (*Boyd* v. *United States*, 116 U. S. 616).

In the lower Court the respondent conceded that these exhibits were of no significance. Why were they then put into evidence? Why were they not withdrawn from the case before its submission to the jury and who can say what effect these exhibits had on the jury? As reversible error is practically conceded, it should not have been ignored by the Circuit Court of Appeals.

POINT D

The Circuit Court erred in upholding the conviction although it was based upon an identification resting wholly upon concurrence of names which under general criminal law is wholly inadequate for purposes of identification.

The Circuit Court held that, "At the trial the prosecution introduced evidence that defendant's name appeared on a so-called list 'of those who have applied for Passports,' which, according to Illian, a stenographer at the German Consulate in New York in charge of collecting dues for the local branch of the Nazi Party, was in reality a list of the members of that organization, prepared from files and folders shortly before these disappeared from Party Headquarters in May, 1940. Defendant's name also appeared on a partially burnt list of members in arrears in payment of dues, with definite indications that his delinquency had been removed and his arrears paid in February, 1940."

These holdings are grounded on assumptions having no support from the record. The exhibits referred to by the lower Court are 24 and 25. But where is there proof of the connection between the name on Exhibits 24 and 25 and petitioner? Unequivocally, we state there is none.

In this connection it was strange indeed that the Government's star witness Illian, who worked for over two years in the German Consul's office collecting dues from Nazi

party members, keeping records, etc., failed to testify that she knew petitioner, ever saw him, corresponded with him or collected dues from him. It is apparent that the witness Illian did not so testify because she neither knew, nor saw, nor corresponded with petitioner, or ever collected dues from him.

Identity of name is not sufficient in a criminal prosecution to show identity of person (*People* v. *Reese*, 258 N. Y. 89, 96; *People* v. *Rubin*, 286 N. Y. 56, 59; *Ayers* v. *Ratshefsky*, 213 Mass. 589, 101 N. E. 78, 80, and the authorities there cited).

In *People* v. *Rubin*, the Court of Appeals of the State of New York (op. Loughran, J.) held that it was error for the Court to receive in evidence a writing or record bearing the name and business address of the defendant with figures alongside, which a clerk was permitted to testify indicated that at the times represented by the figures fourteen letters were sent to the witness by the defendant. There was no testimony as to how the name and address of the defendant came to be entered upon the record. It was no evidence against the defendant except upon the assumption that in the absence of inherent improbability or credible proof to a contrary effect, the appearance of the same name at all times designates a given person. The jury should not have been permitted to hypothesize for the purpose of the defendant's conviction of the crime charged and it cannot be assumed that the error was a technical one not affecting the substantial rights of the defendant. The Court cited, 2 Chamberlayne on The Law of Evidence, Sec. 1187; 15 Am. & Eng. Encyc. of Law (2d Ed.), pp. 918-924; 9 Wigmore on Evidence (3d Ed.) 2529; *People* v. *Reese, supra, People* v. *Sellinger*, 265 N. Y. 149.

As in the *Rubin* case, there is none of the required connecting proof to render Exhibits 24 and 25 admissible in evidence, and their retention in evidence was reversible error.

CONCLUSION

It is, therefore, respectfully submitted that this Court should grant a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, as prayed for in the petition.

Dated: May 28, 1945.

GEORGE BOOCHEVER,
ROBERT L. BOBRICK,
Counsel for Petitioner.

(16)

No. 1331

In the Supreme Court of the United States

OCTOBER TERM, 1944

BRUNO ALBERT FREDERICK HEINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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650607—45

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OPINION BELOW

The opinion of the circuit court of appeals (R. 194–198) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 14, 1945 (R. 198–199). The petition for a writ of certiorari was filed May 29, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for making a false statement as to membership in the Nazi Party in an application for a certificate of identification as an enemy alien, it was error to admit evidence that a name similar to petitioner's appeared on a list of party members which had been prepared in the office of the German Consulate.

2. Whether the trial court erred in admitting various exhibits.

3. Whether the fact that, in reading the statute to the jury, the judge included a phrase which had been deleted by an amendment, constituted prejudicial error.

STATUTES INVOLVED

Section 35 (A) of the Criminal Code, as amended (18 U. S. C. 80), provides in pertinent part as follows:

> * * * whoever shall * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

R. S. 4067, as amended by the Act of April 16, 1918, c. 55, 40 Stat. 531, provides in part as follows:

> Whenever there is a declared war between the United States and any foreign

> nation or government * * * and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who became so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted * * * and to establish any other regulations which are found necessary in the premises and for the public safety.

Presidential Proclamation 2537, issued January 14, 1942 (3 C. F. R. Cum. Supp.), provided in part:

> All alien enemies within the continental United States— * * * are hereby required, at such times and places and in such manner as may be fixed by the Attorney General of the United States, to apply for and acquire certificates of identification * * *.

The regulations of the Attorney General issued pursuant to this proclamation on February 24,

1942 (7 F. R. 1477; 28 C. F. R. Cum. Supp. 30.51 ff.) provide in pertinent part:

> 30.51. * * * persons in the United States * * * required to apply for certificates of identification * * * are as follows:
>
> (a) All aliens who are of the age of 14 years or upward and who are German, Italian or Japanese citizens or subjects.
>
> * * * * *
>
> 30.56. (n) The following information shall be furnished by each applicant:
>
> * * * * *
>
> (14) The applicant shall list the clubs, organizations, or societies of which he has been a member or officer, or with which he has been affiliated, at any time during the period of 5 years preceding the date of such application either in the United States or abroad. In the event that any such listed membership or affiliation has ceased prior to the date of the application, the applicant shall give the approximate date thereof. If the applicant spent any part of said 5-year period outside the United States, he shall include a statement of his foreign political party or national organization affiliation during such portion of said 5-year period as he spent outside the United States.

STATEMENT

An indictment in one count was returned against petitioner in the United States District Court

for the Eastern District of New York charging that, in violation of Section 35 (A) of the Criminal Code, he had made a false statement of a material fact in a matter within the jurisdiction of the United States Department of Justice in that, in an application for a certificate of identification required of enemy aliens (see pp. ——, *supra*), he had stated that he had belonged to no clubs, organizations or societies during the five-year period preceding the date of the application, whereas in fact, he had been a member of the Nazi Party during such period (R. 5–7).

The Government proved that on February 11, 1942, petitioner had made the statement in his application as alleged in the indictment (Gov. Ex. 38, R. 81–82, 163–165). The evidence supporting the charge that such statement was false and that petitioner had in fact been a member of the Nazi Party during the five years preceding the application may be summarized as follows:

A stenographer who had been employed in the office of the German consulate in New York, testified that applications for membership in the Nazi Party by Germans residing in the United States and collection of dues from members were regularly handled through the German Consular Office in New York under the supervision of Dr. Draeger, head of the Nazi Party in New York (R. 30–40). Until 1940 there was kept in that office a file of cards listing the names, addresses,

and occupations of members of the Nazi Party in the United States (R. 40–41). In 1940 those records disappeared (R. 40, 42, 59), but prior thereto, a list of the names which had appeared on the file cards was prepared (R. 42–44). At the direction of one Vogel, secretary to Draeger (R. 28–29), the list was called, "List of names of persons who have applied for passports" (R. 54, 58–59; Gov. Ex. 24, R. 190). Petitioner's name appeared on this list (R. 190). He had never applied for a passport (R. 95–96). His name also appeared on a partially burned list of members whose dues were in arrears, with a notation indicating that his dues had subsequently been paid up to February 1940 (R. 45–47, Gov. Ex. 25, R. 190).

In September 1939 petitioner was dismissed by the Hamburg-American North German Lloyd Co. for which he had worked in Germany and after his arrival in the United States in 1937 (R. 11–13, 84–85). In a letter which petitioner wrote on September 15, 1939, to a director of that company in Germany complaining of his discharge, he stated that he had turned to the German Consul General and to the party office for help, but that they could not assist him (Gov. Ex. 29, R. 151–152). On October 9, 1939, petitioner wrote a letter to the director of the company in New York, a copy of which he stated he was sending to Dr. Draeger (Gov. Ex. 30, R. 153–156); in

this letter he again complained of his discharge and said that "As a party member I am not permitted to become an American citizen" (R. 155). Shortly thereafter, he was employed by Fortra, Inc., an organization through which packages of food were sent to people in Germany (R. 13). Until confronted with the letters during the investigation of the case, petitioner denied that he had ever written to anyone that he was a member of the Nazi Party (R. 65).

After petitioner had obtained his position with Fortra, he told an employee of the Hamburg-American Line that the head of the line in New York "thinks I have been forced upon him, that I came over against his will because I was a member of the Nazi Party in Germany and he thinks he had to take me in" (R. 73–74).

When F. B. I. agents searched petitioner's home (see pp. ——, *infra*) they found a number books bearing swastikas and containing pictures of Hitler, pins representing contributions to the German Winter Relief Fund, and a pin indicating attendance at a Nazi Party convention at Nuremberg (Gov. Exs. 1–8, R. 14–21, 185–186, 122–123).

Petitioner was convicted (R. 149) and was sentenced to imprisonment for 18 months (R. 168–169). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 198–199).

ARGUMENT

1. Petitioner contends (Pet. 8, 12, 27–28) that since there was no proof identifying him as the person whose name appeared on the lists of party members prepared in the office of the German Consulate (see *supra*, p. —), it was error to admit such lists in evidence against him. However, the appearance of a name similar to petitioner's on the lists clearly tended to corroborate his own statements that he was a member of the Nazi Party and thus was a circumstance which the jury was entitled to consider. Cf. *Brink* v. *United States*, 60 F. 2d 231, 234 (C. C. A. 6), certiorari denied, 287 U. S. 667. As the court below held (R. 195), all the evidence together constitutes "persuasive" proof of petitioner's guilt.

2. There is no merit in petitioner's objections to the admission of various exhibits (Pet. 7, 12, 20–27).

(a) The evidence of German publications and various Nazi insignia found in petitioner's home (see Pet. 20–21) was directly relevant to the charge in the indictment that he had concealed his membership in the Nazi Party. Petitioner had told investigating officials that he was not a member of the Nazi Party, that he was not in sympathy with the Nazis, and, when confronted with his letters to the directors of the Hamburg-American Line, had said that his statements that he was a member were fabrications designed to

secure his reinstatement in his former position (R. 13, 64–65). It was therefore proper for the Government to introduce evidence tending to show that petitioner was more sympathetic to the Nazi Party than he claimed to be. Cf. *United States* v. *Cramer,* 137 F. 2d 888, 897 (C. C. A. 2), reversed on other grounds April 23, 1945, No. 13, this Term; *United States* v. *Pelley,* 132 F. 2d 170, 181 (C. C. A. 7), certiorari denied, 318 U. S. 764.

(b) As set forth in the Statement, *supra,* a former stenographer employed in the German Consulate identified the lists on which petitioner's name appeared as lists of Nazi Party members. In the course of her testimony as to the manner in which party affairs were handled in the consular office, the Government introduced samples of the forms of application, membership cards, dues, receipts, etc. (Gov. Exs. 10–23, 26–27, R. 30–39, 48, 57, 186–189, 190–191). Petitioner contends that these exhibits were irrelevant and prejudicial (Pet. 21–25). However, the exhibits were properly admitted as tending to establish the authenticity of the witness's testimony that the lists were in fact known to her to be lists of Nazi Party members. The trial judge was careful to limit the purpose for which these general exhibits were received in evidence by charging the jury that they "were admitted only for completeness. They do not tend—and I cannot make this too clear—do not tend to show—there is no

entry on any one of them containing the name of this defendant" (R. 142–143). The judge advised the jury not to look at the exhibits, but stated that they would have the right to consider them as material used in the compilation of the lists (R. 143).

(c) Petitioner contends (Pet. 25–27) that other exhibits (Gov. Exs. 2, 30–35, R. 16, 66–68, 185, 192) were unlawfully taken from his home. These were obtained in November 1942 by an F. B. I. agent at a time when only petitioner's wife was at home (R. 61).[1] His wife testified that she resented the search but stated that "I just let him go ahead and search the home" (R. 135) and that "I am very sure that Mr. Fitzgerald knows that I was very cooperate (*sic*) in the search" (R. 136). It is thus evident, as the circuit court of appeals held (R. 197), that the wife did not withhold her consent to the search. In any event, petitioner made no motion to suppress this evidence before trial and, although he objected to the admission of other exhibits, he did not seek to have these exhibits excluded (R. 82). Petitioner is, therefore, not now in a position to contest the validity of the means by which these exhibits were obtained. *Nardone* v. *United States,* 308 U. S. 338, 341–342; *Seguerola* v. *United States,* 275 U. S. 106, 111; *United States* v. *Wernecke,*

[1]A previous search had been madei n January 1942 with petitioner's consent (R. 10).

138 F. 2d 561, 564 (C. C. A. 7), certiorari denied, 321 U. S. 771; *Peters* v. *United States,* 97 F. 2d 500, 502 (C. C. A. 9).

3. At the outset of his charge, the trial judge read to the jury the governing statute (Section 35 (A) of the Criminal Code), included the phrase, "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States or any Department thereof," which had been deleted by the amendment of June 18, 1934, c. 587, 48 Stat. 996 (R. 138). Petitioner contends (Pet. 8–9, 12, 13–18) that the inclusion of this phrase enabled the jury to base its verdict upon an offense not charged in the indictment. However, immediately following the reading of the statute, the judge instructed the jury: "The charge contained in the indictment is that this defendant falsely and with knowledge of its falsity misrepresented to the United States something that the United States was entitled to know, namely, that he was a member of the Nazi Party. That is the charge." Subsequently, the judge charged the jury in substance that the only contested issue in the case was whether petitioner had been a member of the Nazi Party within the five-year period preceding his application for a certificate of identification (R. 142). Manifestly, therefore, the error in the reading of the statute could not have misled the jury and does not constitute reversible error (cf. *Douchan* v. *United States,* 136 F. 2d 144, 147–

148 (C. C. A. 6), certiorari denied, 319 U. S. 773; *Clark* v. *United States,* 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789); particularly since counsel for petitioner failed to call the judge's attention to the error and took no exception to the charge in this respect. *Johnson* v. *United States,* 318 U. S. 189, 201; *United States* v. *Manton,* 107 F. 2d 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664. As the court below pointed out (R. 196), moreover, the error, if it had any influence at all, operated favorably to the petitioner.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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